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No. 878

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In the Supreme Court of the United States

Appeal from

The Court of Appeals of Logan County, Ohio

HAROLD C. FOREMAN and EDITH L. FOREMAN

Appellants

vs.

THE CITY OF BELLEFONTAINE

Appellee

STATEMENT IN SUPPORT OF JURISDICTION

HAROLD C. FOREMAN and EDITH L. FOREMAN
134 E. Spring Ave.
Bellefontaine, Ohio

Appellants, In Propria Personæ

JAMES E. WEST
[illegible] South Main St.
Bellefontaine, Ohio

City Solicitor and Attorney for Appellee

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CIVIL ACTION No. .....

In the Supreme Court of the United States

HAROLD C. FOREMAN and EDITH L. FOREMAN
Husband and Wife
124 E. Spring Ave.
Bellefontaine, Ohio

Appellants

vs.

THE CITY OF BELLEFONTAINE
Bellefontaine, Ohio

Appellee

STATEMENT IN SUPPORT OF JURISDICTION

The Appellants, Harold C. Foreman and Edith L. Foreman, in support of the Jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

I. No official or unofficial reports of the opinions delivered in the Courts below.

The text of the order by the Supreme Court of Ohio in which Appellants application for rehearing was denied; the order by the Supreme Court of Ohio dismissing Appellants appeals; the Judgment of the Court of Appeals, Third Appellate Judicial District of Ohio, and the decision of the trial Court, and order denying rehearing are set forth in Appendix I to this statement.

II. This proceeding is an appeal by the Appellants Harold C. Foreman, and Edith L. Foreman, husband and wife, owners herein involved, from a final Judgment and order of the Supreme Court of Ohio which Judgment and order dismissed Appellants appeal from the decision of the

Court below wherein a Statute of the State of Ohio, and a City Law enacted pursuant thereto, changed the zoning classification of Appellants property from business class to residential class and the impact caused a substantial lesser value because of the use restrictions imposed by the Statute and Ordinance.

The date of the Judgment and final order aforesaid herein sought to be reviewed is December 5, 1962, and the date of its entry is **December 20, 1962.** The date of the order denying a rehearing is December 19, 1962, and the notice of appeal herein was filed in the Court of appeals, Logan County, Ohio on January 5, 1963, or ninety days after the entry of said order.

The statutory provision believed to confer on this court jurisdiction of this appeal is USC 28:1257 (2).

The following cases are believed to sustain the Jurisdiction of the Supreme Court of the United States on this appeal:

Village of Euclid vs. Realty Co. 272 U.S., 365

"The Supreme Court of the United States did hold that it was not necessary for the plaintiff in that case to exhaust its remedies under the Ordinance before seeking such an injunction."

Lawton vs. Steele, 152 U.S. 133

"The Legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations."

Baltimore & Ohio Railroad Co. vs. United States, et al, 298 U.S. 349, in the opinion of which case on page 368 the following is found:

"The due process clause assures a full hearing before the Court or other tribunal empowered to perform the judicial function involved that includes the

right to introduce evidence and have judicial findings based upon it."

Postal Telegraph Cable Company vs. Newport 247 U.S. 464, in the opinion of which case on page 473 the following is found:

"But the question arises whether the basis of fact upon which the State Court rested its decision denying asserted federal rights has any support in the record; for if not, it is our duty to review and correct the error."

The Statute of the State of Ohio whose validity is involved is State Law Section 713.15, Ohio Revised Code, effective August 27, 1957, of Chapter 713. Title 7, the text of said Statute follows:

713.15 Retroactive zoning ordinance prohibited.

The lawful use of any dwelling, building, or structure and of any land or premises, as existing and lawful at the time of enacting a zoning ordinance or amendment thereto, may be contained, although such use does not conform with the provisions of such ordinance or amendment, but if any such nonconforming use is voluntarily discontinued for two years or more, any future use of such land shall be in conformity with sections 713.01 to 713.15, inclusive, of the Revised Code. The legislative authority of a municipal corporation shall provide in any zoning ordinance for the completion, restoration, reconstruction, extension, or substitution of nonconforming uses upon such reasonable terms as are set forth in the zoning ordinance.

History: 127 vs. 18 Eff. 8-27-57.

The City of Bellefontaine zoning ordinance No. 2493, Article 16, Section 16.02 enacted pursuant to State Law 713.15 and effective September 9, 1957, whose validity

is involved the text of which follows:

16.02 DISCONTINUANCE—USE CEASED: No building, structure, or premises where a non-conforming use has ceased for one (1) year or more shall again be put to a non-conforming use.

State Law Section 715.03, Ohio Revised Code, as stated in Pages Ohio Revised Code under Title 7 provides: "a Municipal Corp. has only such powers as are expressly granted by Statute."

Appellants believe that the Appellee herein, enacted ordinance No. 2493 and Section 16.02 without authority in law therefore, arbitrarily confiscated the business property herein involved.

The foregoing sections are believed to conflict with Section I of the Fourteenth Amendment to the Constitution of the United States and, as applied to the Appellants business property is a confiscation of said property and is a deprivation of property without due process of law and denies equal protection of the laws.

III. Questions raised by the appeal.

Has aforesaid Section 713.15 of Chapter 7, Ohio Revised Code superseded The Fourteenth Amendment to the United States Constitution, the text of Section I is as follows:

AMENDMENT XIV — Citizenship Rights not to be abridged.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within

its jurisdiction the equal protection of the laws.

Does aforesaid Section 713.15 supersede the well settled decisions of our Federal and State Courts which have been in the past in full agreement on the following: "The substantial value of property lies in its use. If the right of use is denied, the value of the property is annihilated and ownership is rendered a barren right."

In the Curtiss, Appellee vs. City of Cleveland, Appellant; The Kangesser Co. et al., Appellees, decided in the Supreme Court of Ohio,

10 00 (2d) 85

on December 16, 1959, the pertinent parts are as follows: Where property has a substantially lesser value because of use restrictions imposed by zoning legislation, it is not necessary to wait for any further impact on such property from such zoning legislation before seeking injunctive relief therefrom with respect to such property.

On page 88 third paragraph the syllabus reads as follows: However, the evidence clearly discloses that the properties of appellee have a substantially lesser value because of the use restrictions imposed by the 1945 and 1949 amendatory ordinances. In such an instance, it is not necessary to wait for any further impact on such properties from a zoning ordinance or an amendment thereto before seeking injunctive relief with respect to such properties. State, ex rel. Lieux vs. Village of Westlake 154 Ohio St., 412, 417, 43 O.O., 343, 345, 96 N.E. (2d), 414, Village of Euclid vs. Ambler Realty Co., 272 U.S., 365, 71 L.Ed., 303, 47 S.Ct., 114,54 A.L.R., 1016.

In the Curtiss, Appellee vs. City of Cleveland et al., Appellants, et al, Appellees. On Remand to Court of Appeals Cuyahoga County. 12 00 (2d) 415.

The syllabus reads quote: A zoning ordinance amendment making property improved with retail business a nonconforming use without a right of substitution or change, except by permission of the zoning board of appeals and at its discretion, conflicts with the provisions of Section 713.15, Revised Code (127 Ohio laws, 18, 19), that a zoning ordinance "shall provide * * For the completion, restoration, extension or substitution of nonconforming uses," and is unconstitutional as to such property, where, because of the improvement thereof and the surrounding circumstances, such amendatory ordinance bears no substantial relation to the public health, safety, morals or general welfare.

In the Case of the State, exrel. Stulbarg et al vs. Leighton, Commr., et al. 18 00 (2d) 94. The pertinent part of the decision is as follows:

A zoning ordinance restricting the use of property, if applied retroactively to deny a use of property which was permitted use under a previous ordinance, in contravention of the due process clauses of the federal and state constutitions, is un-constitutional as to such premises.

The above case was appealed to the Supreme Court of Ohio and dismissed on Application of Appellants on October 7, 1959, as a moot question.

IV. Statement of the Case.

In January, 1948, the Appellants, Harold C. Foreman, and Edith L. Foreman, husband and wife, acquired by purchase the business property herein involved and the present business activity which was grains, feeds, paints, and a general farm supply business and on January the 18, 1950, the Appellee herein, granted and issued to the Appellants a building permit for the purpose of expanding

the business building and enlarging the business operation. Stipulation No. 21, contained in the stipulations as to fact makes Case No. 24318, Foreman vs. Brugler, a part of the record herein, which shows the defendant in that case unlawfully took control of the driveway to the Foreman property. As a result the Appellants herein was forced to involuntarily discontinue all business operations, in April, 1955. The record further discloses Appellants was awarded ownership of the driveway by the Court in August, 1958. The record in this case shows zoning ordinance No. 2493 was enacted on September 9, 1957; that said ordinance was not published in accordance with the law and as a result thereof on June 3, 1959, in a Journal entry filed in the Common Pleas Court, Logan County, Ohio, in case No. 25714, Journal 58, Page 399, said Zoning ordinance 2493 was declared invalid and ineffective and ordinance No. 1382 of the said City of Bellefontaine was in full force and effect Copy of said Journal entry is included in the Appendix. Appellee subsequently published zoning ordinance 2493 in part and declared it to be in full force and effect and as a result of aforesaid zoning ordinance and the use restrictions upon Appellants property the market value was destroyed.

On August 1, 1960, Mr. Harry Caldwell, Secretary to the Planning Commission of the City of Bellefontaine, advised one of the Appellants herein, Harold C. Foreman, in a letter that if we were not satisfied with the zoning classification we could submit applications to the Board of Zoning appeals or the Planning Commission who would determine if Appellants business property could be used for any purpose other than residential.

In October, 1960, Appellants herein filed their petition against the Appellee herein, in the Common Pleas Court of Logan, Ohio, in which the federal questions herein con-

tained was put in issue. The case was assigned for trial on August 1, 1961, at 9:00 A.M., the record shows twelve (12) witnesses were present to testify in behalf of the plaintiffs, including Mr. Paul Watkins, Clerk of the Bellefontaine City Council.

The transcript of the proceedings as of August 1, 1961, constitutes the standard of the trial proceedings conducted by the trial Judge. At 9:00 A.M. the court said to the Appellant "you have twelve witnesses subpoened and it would require three or four days of hearing in open court. I am not going to sit in this heat when this case can be submitted on stipulations as to fact." On page nine of the transcript of the proceedings as of August 1, 1961, shows the trial judge ordered all waiting witnesses excused, over the protest of the Appellant. A trial by jury was likewise denied. Clerk of Council Paul Watkins was present to testify as to the enactment of the zoning ordinance 2493 and after being dismissed by the Court the City Solicitor representing the Defendant made willful false statements relative to the enactment of said ordinance with the full knowledge and approval of the trial Judge. On page 40 of the Transcript of the Proceedings as of August 1, 1961, shows the trial court dictated to the court reported the Stipulations as to Facts which is a part of the record in this case and then ordered the Appellant to return on October 11, 1961, to subscribe to such stipulations. In December, 1961, the trial court rendered a decision the pertinent part which is as follows quote: This Court, therefore, is of the opinion that Plaintiffs herein must exhaust their administrative remedies under article 61 of the Zoning Ordinance before they should be permitted to apply to this court contesting the constitutionality of the Ordinance on the basis that the Ordinance results in a confiscation of their specific property.

The federal questions was not decided and Appellants seasonably moved for a rehearing, which was denied.

The decision by the trial court was timely appealed and perfected, and on the 26th day of February, 1962, Appellants filed a motion in the Court of Appeals, Logan County, Ohio, alleging that Mr. James B. West, City Solicitor, City of Bellefontaine, Ohio, did willfully testify falsely upon an inquiry, made as described in Section 2315.24 Revised Code with intent to mislead the Courts and obstruct justice. That the said false statements are No.'s 6 and 20 contained in the Stipulations as to Facts. And further that a true and certified copy of the minutes of the Bellefontaine City Council for the Dates of August 26, 1957, and September 9, 1957, which contain the facts, be admitted to and made a part of the record in this case.

On April 3, 1962, the Court of Appeals, Logan County, Ohio, filed a Journal entry in which their decision was quote: This cause having come on to be heard on the motion of the plaintiffs-appellants filed on February 26th, 1962, the court find that said motion in both of its branches is not well taken and the same is hereby overrulod.

There was no trial de novo in the Court of Appeals, the case being submitted on briefs by the respective parties. The Court of Appeals on June 15, 1962, filed a Journal entry containing the "judgment of the Court in which the judgment of Court of Common Pleas is hereby affirmed at the costs of plaintiff-appellant, Harold C. Foreman. Cause remanded for execution. Exceptions saved to said plaintiff-appellant."

In the same decision and Journal entry the Court further determined quote "The Court finds sua sponte that purported notice of appeal of plaintiff, Edith L. Foreman, filed February 23, 1962, was not signed by her individually or by any person empowered by law to sign said notice in

her behalf. Appeal dismissed as to Edith L. Foreman. Exceptions said dismissal saved to her." The latter shows the Court decided an issue which was not properly before the court and appellants believe this was gross abuse of discretion, arbitrary, unwarranted, and discriminatory; and was a vicious attack on our sacred contract of marriage, whereon our interests were common and a duty placed upon the husband to protect his wife's interests and rights. We believe there is only one case in past Judicial history wherein a court sua sponte determined the legal capacity of a United States Citizen as to the right to sue or have his or her rights determined by Judicial proceedings. The only analogous case which appellants can cite is the Chief Justice Taney decision in the Dred Scott case 19 How. (U.S.) at 403.

Thereafter notice of appeal was timely filed in the Court of Appeals, Logan County, Ohio, and the case was appealed to the Supreme Court of Ohio, wherein, appeal was taken both on appeal as of right and certiorari on the grounds of a conflict in the judgment of the Court of Appeals, Logan County, Ohio, with the judgment of other Courts of Appeals.

On December 5, 1962, the Supreme Court of Ohio dismissed the appeal as of right for the reason that no debatable constitutional question exists herein and on the same date overruled the certiorari.

Appellants then filed an application in the Supreme Court of Ohio for a rehearing within the time prescribed by the rules of said court for filing such applications. The grounds contained in said application for rehearing was based solely on Federal questions, and on December 19, 1962, Supreme Court of Ohio ruled quote: "It is ordered by the Court that rehearing in this case is denied."

V. Presentation of grounds upon which it is contended

that the federal questions are substantial.

The appellant respectfully represents that the questions involved in its appeal to the Supreme Court of the United States are of a substantial nature. It is well established that an appeal will not be dismissed for want of a substantial federal question, unless the contentions of the appellant are "clearly not debatable and utterly lacking in merit." Hamilton vs. Regents of University of California, 293, U.S. 245, 258.

The issue raised by the appellants contentions that the Ohio Statute and City Law herein in question violates the equal protection clause and the due process clause of Section I of the Fourteenth Amendment to the Constitution of the United States involves a problem of discriminatory classification and confiscation of appellants property.

The issue raised by the appellants contention that the standard of Judicial procedure employed in the State Courts to determine the issues and rights of the appellants does not constitute equal protection and due process of law as provided in Section I of the Fourteenth Amendment of the Constitution of the United States.

Appellants believe and contend that it is not within the scope of the Fourteenth Amendment of the Consitution of the United States whereby a State Court may adjudge and determine that a wife must retain a member of the bar association to represent her interests and rights separately from that of the husband's in the same case when the interests and rights of the husband and wife are joint and common.

A copy of the decision delivered by the trial court, copies of opinions delivered by the Court of Appeals, and copies of all final orders of the Supreme Court of Ohio, are appended hereto.

Therefore the appellants, Harold C. Foreman, and

Edith L. Foreman, husband and wife, respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal by virtue of USC 28: 1257 (2) of the United States Code.

Respectfully submitted,

Harold C. Foreman
Edith L. Foreman
Appellants, in propria persona
124 E. Spring Ave.
Bellefontaine, Ohio

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO

City of Columbus

1962 TERM

Harold C. Foreman et al
Plaintiffs-Appellants

vs

City of Bellefontaine
Defendant-Appellee

No. 37687

REHEARING

It is ordered by the Court that rehearing in this case is denied.

I, JOHN W. McMILLAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ..... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court

this ..... day of ..... 19 .....

..... Clerk.

By ..... Deputy.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO

City of Columbus

1962 TERM

To wit: Wednesday, December 5, 1962

Harold C. Foreman et al

Plaintiffs-Appellants

vs.

City of Bellefontaine

Defendant-Appellee

No. 37687

APPEAL FROM THE COURT OF APPEALS

for Logan County

This cause, here on appeal as of right from the Court of Appeals for Logan County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no debatable constitutional question exists herein.

It is further ordered that the defendant-appellee recover from the plaintiffs-appellants its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Logan County for entry.

I, John W. McMillan, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19.....

..... Clerk

..... Deputy

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO
City of Columbus

1962 TERM
To wit: Wednesday, December 5, 1962

Harold C. Foreman et al
Plaintiffs-Appellants

vs.

City of Bellefontaine etc.
Defendant-Appellee

No. 37687

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS
for Logan County
TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Edith L. Foreman.

I, John W. McMillan, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this

.....day of.....19.....

.....Clerk

.....Deputy

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO
LOGAN COUNTY

Harold C. Foreman, et al
Plaintiffs-Appellants

vs.

City of Bellefontaine
Defendant-Appellee

Case Number 1020

JOURNAL ENTRY

This cause having come on to be heard on the motion of the plaintiffs-appellants filed on February 26th, 1962, the court find that said motion in both of its branches is not well taken and the same is hereby overruled.

On motion of plaintiffs-appellants for additional time to file their assignments of error and brief appellants are hereby given leave to file their assignments of error and brief on or before the 30th day of April, 1962.

/s/ J. Thomas Guernsey
/s/ George S. Middleton
/s/ Raymond A. Younger
Judges

(ORIGINAL OF THIS ENTRY WAS FILED WITH THE CLERK OF COURTS OF LOGAN COUNTY APRIL 3, 1962)

IN THE COURT OF APPEALS

THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

LOGAN COUNTY

Harold C. Foreman, et al
Plaintiffs-Appellants

vs.

City of Bellefontaine
Defendant-Appellee

CASE No. 1020

JOURNAL ENTRY

This matter came on to be heard on the appeal of Harold C. Foreman and Edith L. Foreman, the transcript, Journal Entries and briefs and the court, being fully advised in the premises, finds as follows:

The court finds sua sponte that purported notice of appeal of plaintiff, Edith L. Foreman filed February 23, 1962, was not signed by her individually or by any person empowered by law to sign said notice in her behalf. Appeal dismissed as to Edith L. Foreman. Exceptions to said dismissal saved to her.

The court further finds that transcript of docket and Journal Entries shows that the case was tried and heard by the trial court on a stipulation of facts agreed to under date of August 11, 1961, by and between the plaintiff-appellant, Harold C. Foreman, and the defendant-appellee, City of Bellefontaine; and that the said plaintiff-appellant has not filed herein any Bill of Exceptions showing any hearing or trial other than on said stipulation of facts

although he has alluded in argument to the same. The court further finds that there is nothing in the record before this court including said stipulation of facts to demonstrate that the trial court committed any error prejudicial to plaintiff-appellant in any of the particulars assigned and argued. Judgment of the Court of Common Pleas is hereby affirmed at the costs of plaintiff-appellant, Harold C. Foreman. Cause remanded for execution. Exceptions saved to said plaintiff-appellant.

J. Thomas Guernsey
J. Thomas Guernsey, Judge
George S. Middleton
George S. Middleton, Judge
Raymond A. Younger
Raymond A. Younger, Judge

APPROVED:

Harold C. Foreman
Harold C. Foreman for plaintiffs
James B. West
James B. West for defendants

TO THE CLERK:

ENTER UPON THE JOURNAL OF THE COURT OF APPEALS AND FORTHWITH INFORM ALL COUNSEL THAT YOU HAVE DONE SO.

J. Thomas Guernsey
George A. Middleton
Raymond A. Younger

Judges

STATE OF OHIO, COUNTY OF LOGAN, SS:

I, Ruth Cranston, Clerk of the Court of Appeals within and for the aforesaid County and State, do hereby certify that the foregoing is a true and correct copy of the original JOURNAL ENTRY now on file in said Clerk's Office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Bellefontaine, Ohio, this 15th day of June, A.D. 1962.

Ruth Cranston
Clerk, Court of Appeals
Logan County, Ohio

COURT OF COMMON PLEAS

Shelby County

Sidney, Ohio

Huber A. Beery, Judge — Jan. 18, 1962

Mr. James B. West,
Attorney at Law,
126½ So. Main Street,
Bellefontaine, Ohio

Dear Mr. West:

I have signed the Journal Entry submitted to me in the Foreman vs. City of Bellefontaine case, and I am returning it to you for filing.

A copy of this letter is being forwarded to Mr. Foreman so that he may have notice that his time for appeal will begin to run upon the filing of this Entry.

Sincerely
Huber A. Beery
Judge By Assignment.

HAB:MF
CC To Mr. Harold C. Foreman
Incl.

IN THE COMMON PLEAS COURT
Logan County, Ohio

Harold C. Foreman and
Edith L. Foreman

Plaintiffs

vs

City of Bellefontaine, Ohio

Defendant

Case No. 26270

JOURNAL ENTRY

This matter came on for hearing on the petition of the plaintiffs, the answer of the defendant, the statements of the parties and the matter was submitted to the court on an agreed stipulation of fact, exhibits and trial briefs; and the court finds as follows: That the plaintiffs own a certain business property at 713 Rush Avenue in the City of Bellefontaine, Ohio, and on January 18, 1950, defendant, City of Bellefontaine, granted to plaintiffs a building permit to remodel these premises for the purpose of expanding the business; that thereafter, City of Bellefontaine put into effect a Zoning Ordinance No. 2493. The court further finds that plaintiffs do not allege, nor did they prove, that prior to the filing of their petition herein, they made use of the administrative rights available to them under Article 61 of said zoning ordinance. Further, plaintiffs did not prove they had intended to use their property for any specific business. Further plaintiffs have submitted no plans for the future use of this building and are not presently using it for any business purpose.

The court finds from the stipulation of facts and the exhibits that the legislative body of the City of Bellefontaine, Ohio, has clearly followed each and every requirement under Sections 715.01, 715.03, 719.01 and 725.01 of the Revised Code of Ohio for the enactment of a zoning ordinance, and that Bellefontaine Zoning Ordinance No. 2493 is neither invalid, unlawful or unconstitutional.

The court further finds that Case No. 25714 styled, "James D. Peters vs. the City of Bellefontaine, Ohio," which record was made a part hereof by stipulation of the parties, did not undertake to declare Ordinance No. 2493 invalid, but ruled only as to the effective date of the ordinance.

It is, therefore, the finding of this court that the plaintiffs herein must exhaust their administrative remedies under Article 61 of the zoning ordinance before they should be permitted to apply to this court contesting the constitutionality of the ordinance on the basis that the ordinance results in a confiseation of their specific property.

Costs in the amount of $_____ are hereby ordered taxed to the plaintiffs and exceptions saved to the plaintiffs.

_____

Huber Berry, Judge, Common Pleas Court, by assignment

Approved:

_____

Harold C. Foreman for plaintiffs

_____

Attorney for Defendant

IN THE COURT OF COMMON PLEAS
LOGAN COUNTY, OHIO

Harold C. Foreman and Edith L. Foreman
124 E. Spring Avenue
Bellefontaine, Ohio

Plaintiffs

vs.

City of Bellefontaine

Defendant

Case No. 26270

DECISION

BEERY, J. (By Assignment).

Plaintiffs' petition alleges ownership of certain business property located at 713 Rush Avenue in the City of Bellefontaine, Ohio; that in the year 1927 a prior owner erected the original business building, and from time to time remodeled and built additions thereto.

The petition further alleges that Plaintiffs acquired the property and business in the year 1948, and installed city utilities and electric wiring, and on January 18th, 1950, the Defendant, The City of Bellefontaine, granted the Plaintiffs herein a building permit to remodel for the purpose of expanding the business, and thereafter, the City of Bellefontaine put into effect a Zoning Ordinance, No. 2493.

Plaintiff alleges that said Zoning Ordinance has confiscated his property, and is, therefore, unconstitutional, and that the action of the Defendant City of Bellefontaine

is in violation and in contravention to Sections 715.01, 715.03, 719.01 and 725.01 of the Ohio Revised Code.

Plaintiffs pray for an injunction against the Defendant from confiscation, control over and interference with Plaintiffs' property, and further prays for judgment for $40,000.00, and $500.00 per month in addition thereto for each and every month the Defendant continues to confiscate, control and interfere with Plaintiff's property and property rights.

The parties submitted this case to the Court by an agreed stipulation of facts. It is unnecessary to recite the stipulation of facts herein since the facts are a part of the record in this case.

The Court has carefully read the briefs filed respectively by Plaintiffs and Counsel for Defendant, and it is noted that one of the contentions made by Counsel for Defendant herein is Plaintiffs' filing this petition contesting the constitutionality of the Ordinance and applying to a court of equity for relief on the basis that the enforcement of the zoning limitation results in a confiscation of specific property, without exhausting their administrative remedies.

In the Stipulation of Facts it is not indicated, nor did the Plaintiff prove, nor as a matter of fact, did Plaintiff use the administrative rights he had under Article 61 of the Zoning Ordinance.

Plaintiff did not prove that he had intended to use his property for any specific business in the future and did not make an application under Article 61, the administrative section of the Zoning Ordinance in question.

In the Law of Zoning by Metzenbaum, second edition, beginning at page 201, it is stated as follows:

> "In order to present a ripened, a matured controversy in reference to claimed unconstitutionality of a zoning ordinance as it affects a particular parcel, it is

essential—unless there be exceptional circumstances—that the complainant, before entering court, shall have exhausted the available Administrative Remedies."

In the case of The Central Trust Co., Appellee, vs. The City of Cincinnati, Appellant, 15 Ohio Opinions, 378, it is stated as follows:

"Courts will not interfere with the sound discretion of those upon whom rests the responsibility of fixing the boundaries of zones, unless the exercise of this function indicates a wholly arbitrary and unreasonable action, entirely foreign to any consideration involving the safety, health, morals, or welfare of the public."

"The fact that the property adjacent to plaintiffs' property is used for purposes consistent with the business zones in which such adjacent property is located, can have no argumentative force in sustaining the claim of plaintiff that its property must also be included in a business zone on which it abuts."

"Where it is claimed that the enforcement of a zoning limitation results in a confiscation of specific property, the property owner must exhaust the remedies permitted by law, before applying to a court of equity for an injunction." (Court's underscoring.)

It is to be noted that the above case was an action for an injunction, and the court disallowed the injunction for the reason that the Plaintiff did not exhaust the remedies under the zoning ordinance.

On page 380 of the same case, the Court stated as follows:

"But the plaintiff relies upon the case of Village of Euclid vs. Realty Co., supra. The first paragraph of the syllabus is:

"'A suit to enjoin the enforcement of a zoning

ordinance with respect to the plaintiff's land, need not be preceded by any application on his part for a building permit, or for relief under the ordinance from the board which administers it, where the gravamen of the bill is that the ordinance of its own force operates unconstitutionally to reduce the value of the land and destroy its marketability, and the attack is not against specific provisions but against the ordinance in its entirety.'"

"If this rule has the general application which the plaintiff in this case claims includes the specific instance involved, then, as hereinbefore pointed out, almost no zone would stand, for in most every case where a business zone abuts a residence zone, there must be present a direct effect upon the border property, and if there are to be no border properties, there can be no zone divisions, and, consequently no zones.

If the plaintiff is then relying upon the Village of Euclid vs. Realty Co., supra, it must be taken for granted that it is attacking the zoning ordinance in its entirety, in that the plaintiff must assert that "the gravamen of the bill is that the ordinance of its own force operates unconstitutionally to reduce the value of the land and destroy its marketability, and the attack is not against specific provisions, but against the ordinance in its entirety."

On page 381 of the same case, the court states as follows:

"On page 395 of the opinion, the court distinguishes an attack generally upon the ordinance from a claim of specific local injustice and confiscation. If then, the action is predicated upon a general attack it fails for lack of evidence sustaining the right of a

court of equity to intervene and overrule the discretion reposed in the zoning authority. If the attack, as it evidently is, is a charge of specific personal grievance, caused by the application of a perfectly legal ordinance to a particular tract, then the plaintiff has failed to exhaust the remedies offered it in legal channels, and it has no position in this court, requiring it to act in its behalf."

It should be noted in the instant case that the Plaintiffs herein, the Foremans, are pleading the claim of specific local injustice and confiscation of specific property.

In the case of The State, ex rel. Lieux, Appellee, vs. Village of Westlake, et al., Appellants, 154 Ohio State p. 412, in which Ruth Lieux, as a realtor, institute a mandamus action in the Court of Appeals to compel the Village of Westlake and its building commissioner to issue to her a building permit for the construction of a commercial greenhouse on her property in the Village, the commissioner refused to issue the permit on the ground that the issuance would violate the Zoning Ordinance of the Village. The Court of Appeals issued a writ of mandamus ordering the commissioner to issue the permit.

The case was appealed to the Supreme Court, and Judge Taft wrote the decision wherein it was stated as follows in the syllabi:

"Constitutional questions will not be decided until the necessity for their decision arises."

"An applicant for a building permit, whose application is refused because of the provisions of a zoning ordinance, cannot secure a writ of mandamus, compelling the issuance of such permit on the ground that the ordinance as a whole is unconstitutional, without first exhausting administrative remedies provided by such ordinance if such administrative remedies might

not declare Ordinance No. 2493 invalid but ruled only as to the effective date of the Ordinance.

An entry should be prepared by Counsel for the Defendant in accordance with this decision.

enable such applicant to secure the permit."

"The efforts of such applicant, merely to exhaust the administrative remedies provided by such zoning ordinances, will not operate to prejudice such applicant in questioning later the constitutional validity of any part of the ordinance."

In the case of Gutelius, Mayor, vs. Gillen, 29 Ohio Law Abs. 227, it is stated as follows in the second syllabus:

"Courts will not attempt to decide the rights of parties upon a set of facts which are contingent or uncertain, and will not decide future rights in anticipation of an event which may never happen."

As stated before in the instant case, the Plaintiffs have submitted no plans for the future use of this building, are not presently using it for a business and should they decide to do either, the Court is of the opinion that they must first use their administrative remedies provided by the Zoning Ordinance.

This Court, therefore, is of the opinion that Plaintiffs herein must exhaust their administrative remedies under Article 61 of the Zoning Ordinance before they should be permitted to apply to this Court contesting the constitutionality of the Ordinance on the basis that the Ordinance results in a confiscation of their specific property.

In the event the Court may be in error on this point, this Court is of the opinion that the Stipulation of Facts clearly show that each and every step complained of by Plaintiffs herein under Sections 715.01, 715.03, 719.01 and 725.01 of the Ohio Revised Code have been followed by the legislative body of the City of Bellefontaine and that said Ordinance is neither invalid, unlawful or unconstitutional.

It should be noted that the decision in Case No. 25714 entitled James D. Peters vs. the City of Bellefontaine did

Ordinance No. 1382, Charles C. Bewley, Service Safety Director, Secretary, City Planning Commission.

Notice of Ordinance Sec. 721.20 thru 731.25.

James D. Peters, Plaintiff vs. City of Bellefontaine, Defendant, Journal Entry filed June 3, 1959, in Case No. 25714, Journal 58, Page 399.

This matter came on to be heard on the petition of the Plaintiff, James D. Peters, the answer of the Defendant, City of Bellefontaine, Ohio, and statements of counsel, and the Court being fully advised in the premises finds as follows: That the Plaintiff opened and began operating a real estate and insurance agency at 212 E. Sandusky Ave. in the City of Bellefontaine, Ohio, on or about September 1, 1958; that on or about that date ordinance No. 1382 of said City of Bellefontaine was in full force and effect and that by virtue of said ordinance Plaintiff's property at 212 E. Sandusky Ave. was zoned as a business district.

Further that the council of the City of Bellefontaine, did on September 9, 1957, enact Ordinance No. 2493 known as "The City of Bellefontaine, Ohio, Zoning Ordinance," and that said Ordinance has, since the filing of Plaintiffs Petition, to wit: on April 11, 1959, and on April 18, 1959, been published in its entirety in the Bellefontaine Examiner, a newspaper of general circulation in said City of Bellefontaine, Ohio. Further that said Ordinance No. 2493 of the City of Bellefontaine, Ohio, by virtue of Section 731.21 et sec. of the Revised Code of the State of Ohio, could not have become effective until ten days after its first publication on April 11, 1959.

The Court finding that the Plaintiff had purchased the premises and had used and occupied the same as a real estate and insurance agency at 212 E. Sandusky Ave. prior

to the effective date of said Ordinance No. 2493, it is therefore ordered, adjudged and decreed that the City of Bellefontaine be and hereby is restrained and enjoined from interferring with Plaintiff's use and occupancy of said premises for business purposes.

It is further ordered that the defendant pay the costs herein taxed.

R. H. Finefrock, Judge